IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-5324

JULIA GONZALEZ, individually and as Guardian Ad Litem for LUIS GONZALEZ, Age 9, and MANUEL GONZALEZ, age 10, and Further On Behalf of All Persons Similarly Situated,

Petitioners,

v.

JAMES F. YOUNG, Director, Hudson County Welfare Board, and G. THOMAS RITI, Director, New Jersey Division of Public Welfare,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT G. THOMAS RITI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Respondent G. Thomas Riti, Director, New Jersey Division of Public Welfare,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

RICHARD M. HLUCHAN,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT G. THOMAS RITI, DIRECTOR, NEW JERSEY DIVISION OF PUBLIC WELFARE

Questions Presented

1. Does a claim which depends solely upon construction of a federal statute become a right "secured by the Constitution" simply because the Supremacy Clause makes such a statute binding upon the States?

2. Is the federal Social Security Act a statute "providing for equal rights" over which a federal district court may exercise jurisdiction pursuant to 28 USC § 1343(3) and its companion provisions?

3. Is the federal Social Security Act a statute "providing for the protection of civil rights, including the right to vote" over which a federal district court may exercise jurisdiction pursuant to 28 U.S.C. § 1343(4)?

Statutes Involved

42 USC § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 USC § 1343 CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Counter-Statement of the Case

Petitioner filed a verified complaint, containing two counts, in the United States District Court for the District of New Jersey on March 11, 1976. Petitioner and her family are recipients of Aid to Families with Dependent Children (AFDC) (42 USC § 601 *et seq.*) (App. 3-4). The first count of the complaint alleged that petitioner applied to Respondent James F. Young, Director of the Hudson County Welfare Board, for an emergency assistance grant of $163.00 pursuant to section 406(e) of the Social Security Act, 42 USC § 606(e) (App. 4). Repondent Young considered petitioner's application but denied emergency assistance in accordance with New Jersey emergency assistance eligibility criteria, N.J.A.C. 10:82-5.12(c)(1) (App. 5). Petitioner alleged that the denial of an emergency grant on the basis of that state regulation violates section 406(e) of the Social Security Act since the federal eligibility statute is much broader than the state regulation (App. 5). The second count of the complaint alleged that Respondent G. Thomas Riti, Director of the New Jersey Division of Public Welfare, failed to implement "meaningful administrative procedures for welfare recipients who are denied emergency assistance" (App. 6). The complaint sought declaratory and injunctive relief, including an award of $163.00 (App. 6-7).

Cross motions for summary judgment were filed by all parties. In a decision filed on August 13, 1976, the district court found that new state regulations providing administrative hearings to rejected emergency assistance claimants rendered count two moot. The court construed count one to state both statutory and constitutional claims pursuant to 42 USC § 1983:

> "The only constitutional claim the plaintiff presents is that the alleged conflict between the state and federal statutes and regulations violates rights secured for her by the Supremacy Clause of the Constitution. The claim that she has been deprived of rights secured by the laws of the United States is essentially the same: that is, that she has a right under the federal statutes and regulations to receive emergency assistance benefits which are being denied her by state and local officials acting under color of state law." *Gonzalez* v. *Young,* 418 F. Supp. 566 at 569 (D. N.J. 1976).

Without passing upon the "substantiality" of petitioner's alleged constitutional claim, the court invoked 28 USC § 1343(3) and (4) to exercise jurisdiction over the statutory claim, declaring that this result was compelled by an earlier decision in the District of New Jersey. *Id.* at 570-571. As to the merits of petitioner's first count, however, the court determined that on the facts presented the State had not restricted emergency assistance eligibility and therefore had not violated § 406(e) of the Social Security Act. *Id.* at 572. Accordingly, on August 30, 1976, the court ordered that judgment be entered for respondents (App. 20).

On July 15, 1977, the United States Court of Appeals for the Third Circuit vacated the district court's judgment

and remanded the cause with directions to dismiss the complaint for want of subject matter jurisdiction. *Gonzalez* v. *Young,* 560 F.2d 160, 169 (3d Cir. 1977). The court found that petitioner's Supremacy Clause claim was of insufficient substance to confer jurisdiction under 28 USC § 1343(3). *Id.* at 165-166. Although it conceded that petitioner's claim could not succeed without ultimate resort to the Supremacy Clause, the court determined that the claim essentially involved the construction of conflicting statutes and thus could not be deemed "constitutional" in nature. *Id.* Moreover, the court determined that petitioner's statutory claim, based upon the Social Security Act, was not cognizable in the district court pursuant to 28 USC § 1343(3) and (4), since by their very terms these provisions are applicable only to federal statutes "providing for equal rights" and "providing for the protection of civil rights," respectively. *Id.* at 166-168. The court held that neither the Social Security Act, nor 42 USC § 1983, fit either of these descriptions. *Id.*

Summary of Argument

In 1871, Congress for the first time established a federal civil remedy to provide relief to individuals whose constitutionl rights were denied by a state or by persons acting under color of state law. The legislative history of the 1871 Act indicates that the federal cause of action and complementary jurisdiction were expressly designed to enforce the newly enunciated substantive equal rights embodied in the Civil Rights Act of 1866 and the Fourteenth Amendment against state inaction or toleration of private lawlessness. Thus, enforcement of the right to contract, own property, inherit, obtain access to courts, and to full and equal benefit of all laws, irrespective of

a person's race or color, was provided in order that each citizen of the United States could enjoy those essential civil rights which are an integral part of such citizenship.

Although the statute which provides for this remedial cause of action, currently 42 USC § 1983, and its jurisdictional analogue, 28 USC § 1343(3), have been revised and codified over the years, the scope of their coverage has never been enlarged by Congress beyond the enforcement of those clearly defined rights secured by the Fourteenth Amendment and its past and future implementing legislation. As the rights protected by the Fourteenth Amendment have been broadened by judicial construction over the years to embrace various fundamental rights specified in the Bill of Rights, so also have § 1983 and § 1343(3) been broadened by implication in order to continue their function as statutes designed to enforce Fourteenth Amendment rights. Congress has never, however, made § 1983 and § 1343(3) applicable to the enforcement of general statutory rights in addition to those grounded in the Fourteenth Amendment and its implementing legislation. Thus, § 1343(3) provides a federal forum only when rights secured by the Constitution or any "Act of Congress providing for equal rights" are at stake.

Petitioner seeks enforcement of an alleged right to public assistance benefits secured not by the Fourteenth Amendment or any equal rights legislation but by the Social Security Act. The Act itself does not provide for access to the federal courts to assert such statutory rights. Congress specifically provided for State enforcement of that Act by requiring that claimants who are denied benefits have the right to an administrative "fair hearing" to seek vindication of Social Security Act claims. Although these rights could also be asserted in the federal

courts under general federal question jurisdiction, 28 USC § 1331(a), petitioner's claim is for less than the $10,000 minimum amount.

Petitioner alleges that resort to § 1983 and § 1343(3) is proper because she is asserting a right secured to her by the Supremacy Clause of the Constitution. It is clear, however, that petitioner's claim will stand or fall only upon the construction, operation or effect given to the source of her claim § 406 (e) of the Social Security Act. The Supremacy Clause, under these circumstances, is not the object of judicial analysis, but is a principle of federalism which automatically requires a federal statute to supercede state law when a congressional intent to preempt an area is found. The mere chance that the Supremacy Clause may be invoked to provide such a result does not transform a statutory right into a right of constitutional dimensions.

Alternatively, petitioner contends that her statutory right under § 406(e) of the Social Security Act is enforceable pursuant to § 1983 and § 1343(3), since § 1983 is available to enforce rights secured by the "Constitution and laws." The phrase "and laws" (§ 1983), however, must be read as complementing the phrase "equal rights" (§ 1343(3)). Since the Social Security Act obviously does not implement the Fourteenth Amendment and does not secure "equal rights," enforcement of the Act is beyond the scope of § 1983 and § 1343(3). A holding to the contrary would clearly offend the legislative intent underlying these remedial provisions, and would attribute to Congress the creation of a remedial cause of action with no corresponding jurisdiction.

Petitioner's resort to 28 USC § 1343(4), which was enacted in 1957 to provide jurisdiction to redress rights secured by laws "providing for the protection of civil

rights, including the right to vote," fares no better for similar reasons. The Social Security Act certainly does not "protect civil rights." Nor does § 1983 itself do so, since it secures no substantive rights at all. Section 1983 is merely the provision which permits a cause of action to be brought in a federal court if rights secured elsewhere (i.e., by the Constitution or equal rights legislation) are violated.

Accordingly, it is submitted that the Third Circuit properly concluded that petitioner's complaint was not cognizable in the federal courts.

ARGUMENT

POINT I

Since a resolution of petitioner's claim involves only the construction of conflicting Federal and State laws, and does not require any inquiry into the construction, operation or effect of the Supremacy Clause, petitioner's claim is not a substantial constitutional claim arising under, or secured by, the Supremacy Clause.

The essence of petitioner's claim is that her right to receive emergency assistance benefits pursuant to section 406(e) of the Social Security Act (42 USC § 606(e)) has been denied to her under color of a New Jersey regulation, N.J.A.C. 10:82-5.12(c)(1). An examination of petitioner's complaint led both the district court and the court of appeals to conclude that "[t]he only constitutional claim the [petitioner] presents is that the alleged conflict between the State and Federal statutes and regulations violates rights secured for her by the Supremacy Clause of the Constitution." *Gonzalez* v. *Young,* 418 F. Supp. 566, 569 (D. N.J. 1976), vacated and remanded, 560 F. 2d 160, 165 (3d Cir. 1977). Based upon this purported denial of constitutional rights secured by the Supremacy Clause, petitioner has set up a cause of action for redress pursuant to 42 USC § 1983 with concomitant federal jurisdiction grounded in 28 USC § 1343(3). Accordingly, this case squarely presents an issue which the Court noted but left unresolved in *Hagans* v. *Lavine,* 415 U.S. 528, 533 n. 5 (1974): whether or not the "secured by the Constitution" language of § 1343(3) should be construed to exclude Supremacy Clause issues.

It has long been established that § 1343(3) confers jurisdiction upon district courts to entertain constitutional claims provided that such claims are of "sufficient substance." *Id.* at 536. Reaffirming that the presence of a substantial federal question "is essential to jurisdiction," the Court in *Hagans* declared that "the federal courts are without power to entertain claims otherwise within their juridiction if they are . . . 'wholly unsubstantial' [or] 'obviously frivolous.'" *Id.* at 537. Aside from the question of substantiality, the *Hagans* Court had no occasion to inquire preliminarily whether the equal protection claim asserted in that case was indeed a federal constitutional question otherwise within its jurisdiction, since the equal protection clause is obviously a recognized source for such claims. Implicit in *Hagans,* however, is the long standing principle that in determining jurisdiction, a federal court must first satisfy itself that an actual constitutional claim or question has been presented. Once satisfied, the court should proceed to the second step in its analysis, an examination of whether the constitutional claim previously identified is indeed substantial enough to warrant the exercise of federal jurisdiction.

The time honored test for determining the existence of a judicially cognizable constitutional claim or question is that the right or immunity claimed by plaintiff must be such that it will be supported if the Constitution is given one construction or effect, and defeated if another construction or effect is given. *Bell* v. *Hood,* 327 U.S. 678, 685 (1946); *Gully* v. *First Nat. Bank,* 299 U.S. 109 (1936); *Little York Gold Washing and Water Co.* v. *Keyes,* 96 U.S. 199 (1878); *Osborn* v. *Bank of U.S.,* 9 Wheat. 738 (1824). A case is truly said to be constitutionally-based, or arise under the Constitution, whenever a correct decision depends upon the construction of a part of the Constitution. See *Cohens* v. *Virginia,* 6 Wheat. 379 (1821). Thus, a case is based upon the Constitution to the extent that there is a dispute as to the meaning and effect of one or more of its provisions. The suit must arise, at least in part, out of a controversy between the parties respecting the construction or operation of the Constitution upon the specific facts involved. Mere incidental involvement or construction of the Constitution is insufficient to present a judicially cognizable constitutional question. See *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561 (1904); *New Orleans* v. *Benjamin,* 153 U.S. 411 (1894). And, of course, as reiterated in *Hagans,* once a constitutional claim is in fact stated, the Court must assure itself that the claim is "substantial" prior to exercising jurisdiction over it.

The Supremacy Clause, *US Const.* Art. VI, cl. 2, provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is clear that claims, such as petitioner's, which are based solely on this provision can never meet the above-stated tests respecting the existence of a Federal constitutional claim. As Mr. Justice Harlan stated for the Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965):

> "Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a State measure conflicts with a federal requirement, the State provision must give way. *Gibbons* v. *Ogden,* 9 Wheat. 1. The *basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes.*" 382 U.S. at 120 (emphasis added).

Petitioner's claim that she is entitled to emergency assistance will not be supported or defeated depending upon what construction the Supremacy Clause is given by the Court. Indeed, there is no dispute at all as to the meaning or effect of the Supremacy Clause in this case; it is conceded that if Congress intended to pre-empt the area of emergency assistance eligibility by virtue of § 406(e) of the Social Security Act, and if a State regulation unduly restricts those eligibility criteria, the Supremacy Clause will be invoked to strike down the conflicting State regulation. The application of the Supremacy Clause to such a situation, however, is automatic and undisputed. No question of the construction or effect of that provision is presented. For this reason, petitioner's rights will be vindicated, if at all, by determining the meaning and effect of federal and state statutes or regulations, and only then by an automatic application of the Supremacy Clause principle, if appropriate. Since, however, it is not the construction, operation or effect of the Supremacy Clause itself which is at issue here, petitioner obviously

has not stated a substantial Constitutional claim consistent with the rule of *Bell* v. *Hood, supra,* and *Hagans* v. *Lavine, supra.**

The extent of petitioner's primary dependence upon statutory, rather than Constitutional, provisions is underscored by an examination of the source of her purported right, section 406(e) of the Social Security Act, 42 USC § 606(e). In *Quern* v. *Mandley,* No. 76-1159 (U.S., *cert.* granted June 6, 1977), and *Califano* v. *Mandley,* No. 76-1416 (U.S., *cert.* granted June 6, 1977) among the issues before the Court is whether § 406(e) specifies emergency assistance eligibility criteria which Congress intended to be binding upon the States, or whether that statute merely delineates the outer parameters within which federal funds will be made available to the State for distribution by them in accordance with programs tailored to individual State needs. Plainly, a holding in those cases embracing the latter alternative would completely undercut petitioner's claim that § 406(e) secures her right to emergency assistance, notwithstanding the existence or operation of the Supremacy Clause. Surely this illustrates the non-constitutional nature of petitioner's claim.

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* Respondent does not contend that a substantial constitutional question can never arise under the Supremacy Clause, for clearly such a question does arise when the construction, operation or effect of the Supremacy Clause is at issue. For example, if an agreement or an interstate compact, ratified by Congress, is found to conflict with a state statute, a question arising under the Supremacy Clause may be presented to the extent that it is necessary to decide whether the agreement or compact is indeed a federal "law" which is supreme. In such a case, it would be necessary to actually construe the Supremacy Clause per se to arrive at the result. Cf. *Antoine* v. *Washington,* 420 U.S. 194 (1975). By contrast, in the case *sub judice,* it is not the Supremacy Clause which is being construed, but the federal and state laws which purportedly conflict.

The issue in *Swift & Co.* v. *Wickham, supra,* was whether a claim of conflict between State and Federal statutes presented a "constitutional" issue requiring the convocation of a three-judge district court pursuant to the former 28 USC § 2281. Although the decision itself was based on the policy behind § 2281, it nevertheless provides valuable insight into the nature of the Supremacy Clause. The Court hypothesized that for the sake of simplicity and workability, it could easily construe § 2281 to apply to all suits to enjoin State statutes conflicting with federal enactments. This alternative was attractive, said Mr. Justice Harlan, for "to be sure, any determination that a State statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." 382 U.S. at 125.

The Court rejected this approach, however, based upon the specific language of § 2281 which it found to evince "a congressional purpose to confine the three-judge court requirement to injunction suits depending directly upon a *substantive provision of the Constitution,*" as opposed to the merely automatic application of principles contained in the Supremacy Clause. *Id.* at 127. In so doing, the Court significantly enunciated what is perhaps the best test as to whether an issue is of "constitutional" or merely "statutory" proportions by remarking that:

> "[T]hose who enacted the three-judge court statute should not be deemed to have been insensitive to the circumstance that single-judge decisions in conflict and pre-emption cases were always subject to the corrective power of Congress, whereas a 'constitutional' decision by such a judge would be beyond that ready means of correction and could be dealt with only by constitutional amendment." *Id.*

Petitioner's rights in this matter are of course subject to the "corrective power of Congress" which, after all, has created and altered emergency assistance and other such rights through its enactment of the Social Security Act as amended. No matter of constitutional proportions is thus implicated.

In rejecting petitioner's contention that she was relying upon a right "secured by" the Supremacy Clause, the Third Circuit, adopting a like decision by the Second Circuit in *Andrews* v. *Maher,* 525 F.2d 113, 118-119 (2d Cir. 1975), stated in language that bears repeating that:

> "The Supremacy Clause does not secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a State law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights that the individual is seeking to vindicate." *Gonzalez* v. *Young, supra,* 560 F. 2d at 166.

When considered against an analogous "fundamental principle of federalism," the Full Faith and Credit Clause, it is certainly not surprising that the Supremacy Clause does not secure federal constitutional rights and is therefore unable to serve as the basis for a jurisdictionally cognizable constitutional claim. The Full Faith and Credit Clause, *U.S. Const.,* Art. IV, § 1, provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Whereas the Supremacy Clause governs the outcome of conflicts between federal and state enactments, the Full Faith and Credit Clause concerns conflicts between laws

of the individual states. Despite the directory ("shall be given") nature of the Full Faith and Credit command, however, it has long been held that this clause secures no rights and may not be the source of a federal constitutional claim.

For example, in *Chicago & Alton R. Co.* v. *Wiggins Ferry Co.,* 108 U.S. 18 (1883), it was alleged that an Illinois statute prohibited the making of a certain contract, but that a Missouri court had refused to adhere to the Illinois act. For that reason, federal jurisdiction was asserted on the basis of Article IV, § 1. The Court decided, however, that the real issue in the case was not the degree of faith and credit which must be given to the public acts of Illinois in Missouri, but what the Illinois law actually meant. The case involved the construction of only state laws and not the federal constitution. Indeed, the Court remarked that if jurisdiction were found under the circumstances of this case, a federal constitutional issue would be presented whenever public acts of one state were to be construed in an action pending in a court of another State.

In *Minnesota* v. *Northern Securities,* 194 U.S. 48 (1904), it was charged that the defendant created and used a New Jersey corporation to affect Minnesota property rights in violation of Minnesota law. Federal jurisdiction was pleaded on the basis that Article IV must be construed to make Minnesota law effective throughout the United States insofar as it affects property rights in that state, for otherwise the policy and laws of any state could be easily evaded. 194 U.S. at 72. The Court, however, employing reasoning similar to that of the Third Circuit in the instant matter, held that no cognizable federal constitutional claim had been presented by these facts:

> "We do not think that the [Full Faith and Credit Clause of the Constitution] has any bearing what-

> ever upon the question under consideration. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting." *Id.*

As a result, it is firmly established that the Full Faith and Credit Clause, taken alone, does not provide the basis for the exercise of federal jurisdiction. *California ex rel. McColgan* v. *Bruce,* 129 F. 2d 421 (9th Cir. 1942), *cert.* denied 317 U.S. 678 (1942); *Hazen Research, Inc.* v. *Omega Minerals, Inc.,* 497 F. 2d 151, 153 n. 1 (5th Cir. 1974); *Carqueville* v. *Woodruff,* 153 F. 2d 1011 (6th Cir. 1946); *Luterman* v. *Levin,* 318 F. Supp. 11 (D. Md. 1971).

It is thus apparent that only after various state or federal statutory rights are definitively construed do the principles embodied in the Supremacy or Full Faith and Credit clauses come into play. These principles of federalism are not themselves the subject of substantive analysis, but are automatically applied once federal and/or state statutory rights are defined.

This conclusion is buttressed by the judicial construction given over the years to the "secured by the Constitution" clause of § 1343(3). In *Carter* v. *Greenhow,* 114 U.S. 317 (1884), the earliest case discussing this phrase, the Court found that to be "secured" by the Constitution a right must be "directly conferred" by one of its provisions. The Court held that the right to non-impairment of a contract was not such a "directly conferred" right, but declined to elaborate further as to what rights were within the contemplation of that phrase. In *Holdt* v. *Indiana Manuf. Co.,* 176 U.S. 68 (1900), the Court held

that the purported right to hold a patent free of State taxation is not "secured by the Constitution," and described that phrase as being applicable only to "civil rights" which remained undefined.

In *Hague* v. *C.I.O.,* 307 U.S. 496 (1938), Mr. Justice Stone addressed the scope of this phrase in his well-known concurring opinion, and determined that "secured" rights included those "created" as well as "protected" by the Constitution. 307 U.S. at 526. Mr. Justice Brennan, concurring in part and dissenting in part in *United States* v. *Guest,* 383 U.S. 745 (1966), expressed the view that "secured" means "created by, arising under or dependent upon" a provision of the Constitution, citing *Logan* v. *United States,* 144 U.S. 263, 293 (1892). 383 U.S. at 779. Thus, a right is "secured by the Constitution" if it "emanates from" or "finds its source in" the Constitution. *Id.* The majority of the Court in *United States* v. *Guest,* however, determined that only rights "fully protected" by the Constitution are "secured" by it.

It is submitted that regardless of which of these formulations is adopted, a claim grounded in the Supremacy Clause fails to meet the test. The right asserted by petitioner neither arises under nor is created or protected by that clause: § 406(e) of the Social Security Act performs all of those functions, if indeed they are performed at all. Petitioner's claim is secondarily "dependent upon" the Supremacy Clause, it is true, but only insofar as that clause operates to declare the final result once a preliminary determination has been made that petitioner does indeed possess a right which is "dependent upon" a federal statute. Under any of these definitions of "secured," the Supremacy Clause therefore fails to secure rights.

This result comports with the purposes of § 1343(3), which was designed to permit those whose civil rights

have been violated to seek relief from the federal courts without having to satisfy an amount in controversy prerequisite. See, e.g., 28 USC §§ 1331, 1332. In practically every instance in which a state statute or regulation conflicts with a federal statute, action under color of state law will be involved. Thus, were the Court to hold that Supremacy Clause claims concern rights "secured by" or arising under the Constitution, the result would be that every such claim would be assertable in federal court, pursuant to §§ 1343(3). The district courts would then be faced with all manner of federal-state statutory conflicts involving everything from frozen turkeys (*Swift & Co.* v. *Wickham, supra*) to avocados (*Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960)) under the guise of civil rights jurisdiction irrespective of the amount in controversy.* Moreover, the courts would be inundated with particularized statutory claims under such programs of cooperative federalism as Aid to Families with Dependent Children (42 USC § 601 *et seq.*), Supplemental Security Income (42 USC § 1381 *et seq.*), Medicaid (42 USC § 1396 *et seq.*), and Social Services (42 USC § 1397 *et seq.*), even though Congress has never expressly authorized jurisdiction over such cases.

In sum, it is submitted that petitioner has failed to allege that she has been deprived of any right secured to her by the Constitution, since the right she asserts is

* It is true that if such claims involve more than $10,000, jurisdiction is proper pursuant to 28 USC § 1331. However, this is so not because the Supremacy Clause *per se* presents a claim which "arises under" the Constitution for purposes of § 1331, but because such claims inevitably arise under the "laws" of the United States to the extent that, as here, they are based on federal statutes. See *Hagans* v. *Lavine,* 415 U.S at 553 (Rehnquist, J., dissenting.).

secured, if at all, by the Social Security Act, and not the Supremacy Clause. Accordingly, the court of appeals properly held that the district court lacked jurisdiction over the purported "constitutional" claim.

POINT II

Since the Social Security Act does not "provide for equal rights," petitioner is precluded from utilizing the remedial provisions of the Civil Rights Act of 1871 to compel the payment of Social Security Act benefits.

Petitioner claims that she is entitled to receive monetary benefits under the emergency assistance program of the Social Security Act, but that these benefits were denied her under color of State law. The sole source of the right to the benefits claimed is section 406(e) of the Social Security Act, 42 USC § 606(e).* Yet, petitioner proceeded to file an action in the district court**

* Whether or not §406(e) secures any right to individuals such as petitioner is an issue currently before the Court in *Quern* v. *Mandley,* No. 76-1159 (U.S., *cert.* granted June 6, 1977) and *Califano* v. *Mandley,* No. 76-1416 (U.S., *cert.* granted June 6, 1977). Respondent submits that §406(e) does not specify emergency assistance benefits eligibility criteria which the States are obligated to follow. Rather, it is respondent's position that §406(e) merely delineates the conditions under which federal funds will be made available to States which wish to operate programs in accordance with local needs. See *Amicus Curiae Brief of the State of New Jersey, Quern* v. *Mandley,* No. 76-1159 and *Califano* v. *Mandley,* No. 76-1416.

** Both the district court and the court of appeals held that jurisdiction over petitioner's claim could not be based on the general federal question jurisdiction statute, 28 USC §1331, for failure to satisfy the $10,000 amount in controversy prerequisite. *Gonzalez* v. *Young, supra,* 418 F. Supp. at 569-570; 560 F. 2d at 164. That determination is not challenged by petitioner.

under the remedial provisions of the Civil Rights Act of 1871, 42 USC § 1983 and 28 USC § 1343(3). Section 1983, however, provides a cause of action to redress the deprivation of rights "secured by the Constitution and laws," while § 1343(3) applies to rights "secured by the Constitution of the United States or by any Act of Congress providing for equal rights. . . ."

Thus, the issue presented to the Court concerns the scope of the rights for which Congress intended the Civil Rights Act of 1871 to afford a remedy. More specifically, the Court once again has before it the issue which it found unnecessary to address in the factual context of *Hagans* v. *Lavine*, 415 U.S. 528, 533 n. 5 (1974), namely, whether rights flowing from the Social Security Act are equal rights of the type that the 1871 Act was designed to redress. Respondent submits that the Third Circuit properly decided this issue by answering in the negative.*

In considering whether Social Security Act rights fall within the remedial scope of §1983 and §1343(3), the value of consulting the legislative history of these provisions cannot be understated. When interpreting these statutes, the Court has often analyzed their legislative history to ascertain the circumstances under which the statutory language was employed in order to shed light upon the Congressional purpose in enacting them. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 580 (1976); *District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973).

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* It is conceded that had petitioner pleaded a substantial constitutional question, the district court could exercise pendent jurisdiction over petitioner's purely statutory claim, irrespective of the amount in controversy, under the doctrine of *Hagans* v. *Lavine*, 415 U.S. 528 (1974). Point I, *supra*, demonstrates, and the court of appeals found, however, that petitioner is precluded from travelling this route because she failed to set forth a substantial constitutional claim.

The Court has expressed its determination that these provisions "be given the meaning and sweep that their origins and their language dictate." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972). Indeed, the Court has consistently recognized that since statutory words generally have different shades of meaning, an attempt should be made to construe them "if reasonably possible to effectuate the intent of the lawmakers." *District of Columbia* v. *Carter, supra*, 409 U.S. at 420. Because of the novelty of the issues raised by petitioner, it is appropriate to look to the legislative history for guidance as to the type of equal rights which Reconstruction-era legislation was enacted to secure.

The Thirteenth Amendment to the Constitution provides an appropriate analytical starting point. Ratified in 1865, that amendment abolished slavery and involuntary servitude throughout the nation and gave Congress the power to make its provisions effective by appropriate legislation. Significantly, the amendment was directed not only to the federal government, but to the States as well as private individuals. See *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1135, 1143 (1977) (hereinafter cited as *"Developments"*); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1324 (1952) (hereinafter cited as "Gressman"); *District of Columbia* v. *Carter, supra*, 409 U.S. at 421-422. Congress assumed that the amendment would have far-reaching effects beyond the abolition of personal bondage and would serve as the basis for guaranteeing certain minimum rights to freedmen. Indeed, the opponents of the amendment attacked it as an undue extension of the power of the federal government for precisely these reasons. Widespread atrocities against the newly freed blacks and their white sympathizers, as well as the enactment in southern states of the notorious "Black Codes," soon made it ap-

parent that the idealistic words of the amendment alone would be ineffective in implementing the amendment's overall goals. *Developments* at 1143; Gressman at 1324-1325.

Congress responded by enacting the Civil Rights Act of April 9, 1866, c. 31, 14 Stat. 27, in order to effectuate the intentions of the amendment by guaranteeing "broad and sweeping protection to basic civil rights." *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 543-544. See generally J. Ten Broek, *Equal Under Law* 178-179 (1965) (hereinafter cited as "Ten Broek"). Section 1 of the Civil Rights Act of 1866 identified a new class of "citizens of the United States" and listed the rights and obligations of such citizens in sweeping terms:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Insofar, as United States citizens engaged in the activities specified in § 1, the Act provided an "absolute bar" to

all discrimination, public as well as private, federal as well as state. *District of Columbia* v. *Carter, supra,* 409 U.S. at 422; Cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 413, 437 (1968).

Section 2 of the 1866 Act, providing criminal penalties for the deprivation of "any right secured or protected" by § 1, was not so broad however. Although "§ 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, . . . only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 426. Section 2 of the Act provided as follows:

> "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

Section 3 of the 1866 Act granted jurisdiction "of all crimes and offenses" committed pursuant to § 2 to "the district courts of the United States . . . exclusively of the courts of the several states." That section also granted concurrent jurisdiction to the district and circuit courts:

> "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."

Section 3 thus vested the federal courts with original as well as removal jurisdiction of actions to enforce any right secured by § 1. *Georgia* v. *Rachel,* 384 U.S. 780, 789 (1966); *Greenwood* v. *Peacock,* 384 U.S. 808 (1966); *Developments* at 1148; P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 846 (2nd ed. 1973); *Mahone* v. *Waddle,* 564 F. 2d 1018 (3rd Cir. 1977), petition for *cert.* filed No. 77-731 (U.S. November 23, 1977). This section marked the beginning of an expanded role for the federal courts in protecting the newly enunciated federal rights of United States citizens. *Developments* at 1147-1153.

The Civil Rights Act of 1866 "culminated the abolitionist concept of the federal government as the protector of the essential principles of liberty." Gressman at 1326. However, opponents of the Act, the very persons who had opposed adoption of the Thirteenth Amendment on the grounds that it too broadly incorporated abolitionist doctrines, subsequently began to argue for strict construction of the amendment. This conveniently revised view held that the amendment was merely designed to terminate the master-slave relationship and nothing more. *Id.* at 1327; Ten Broek at 201. Indeed, it was contended that § 2 of the amendment restricted rather than enlarged its scope, and that therefore the Civil Rights Act itself was unauthorized. *Id.* As a result, in order to ensure that the rights secured by the 1866 Act would be truly nationalized and placed beyond the power of shifting congressional majorities, the Thirty-Ninth Congress decided to make

them part of the Constitution itself by enactment of the Fourteenth Amendment. Gressman at 1329-1331; Ten Broek at 202-203. It is therefore beyond dispute that § 1 of the Fourteenth Amendment was based upon the 1866 Act, thus placing the Act beyond constitutional reproach and vindicating for all persons the rights established therein. Gressman at 1331-1333; *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 544; *Hague* v. *C.I.O., supra,* 307 U.S. at 509-510.

Following the ratification of the Fourteenth Amendment in 1868, Congress began to enforce it "by appropriate legislation" pursuant to § 2 of the amendment. The Enforcement Act of May 31, 1870, c. 114, 16 Stat. 140, reenacted the substantive and penalty provisions of the 1866 Act, thereby resolving any doubt as to the constitutional validity of the earlier Act in the wake of the Fourteenth Amendment. See Enforcement Act of May 31, 1870, c. 114, §§ 16-18, 16 Stat. 140; *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 436; Gressman at 1333-1334. The re-enactment of the 1866 Act thus had the dual purpose of reaffirming the vitality of these rights against State action under the Fourteenth Amendment, and against purely private action under the Thirteenth Amendment and the original 1866 Act. *Id.*

Despite this flurry of legislation, however, Southern resistance to Congress' Reconstruction policies escalated and by early 1871 "there was overwhelming evidence that through tacit complicity and deliberate inactivity, state and local officials were fostering vigilante terrorism against politically active blacks and Union sympathizers." *Developments* at 1153. Atrocities committed by the Klu Klux Klan led Congress to provide civil rights protection "against official inaction and the toleration of private lawlessness." *Id.* President Grant's special message to Congress of March 23, 1871, requested emergency legislation and highlighted the problem:

"A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt: that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session." Cong. Globe, 42d Cong., 1st Sess. 299 (1871).

In response, Congress enacted a bill whose "purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Monroe* v. *Pape,* 365 U.S. 167, 171 (1961); Act of April 20, 1871, c. 22, 17 Stat. 13. Section 1 of the 1871 Act is the acknowledged statutory ancestor of *both* 42 USC § 1983 and 28 USC § 1343(3), and in its original version provided *only* for the enforcement of *constitutional* rights in these terms:

"[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any

State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases."

The Court has correctly noted that "the broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871." *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 545. Indeed, the legislative history indicates that § 1 of the 1871 Act was designed precisely to enforce, in a federal civil action, the substantive rights enunciated in the 1866 Act which were subsequently elevated beyond the reach of future congressional or state tampering by the Fourteenth Amendment. Representative Shellabarger of Ohio, the floor manager of the bill in the House, stated that:

"The model for [§ 1 of the 1871 Act] will be found in the second section of the Act of April 9, 1866,

known as the 'Civil Rights Act.' *That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for,* except that the deprivation under color of State law must, under the Civil Rights Act, have been on account of race, color or former slavery. *This section* of the bill, on the same state of facts, not only *provides a civil remedy* for persons whose former condition may have been that of slaves, but also to all people *where, under color of State law, they* or any of them *may be deprived of rights to which they are entitled under the Constitution* by reason and virtue of their national citizenship." Cong. Globe, 42d Cong., 1st Sess., app. 68 (1871) (emphasis added).

It is at once clear that the "constitutional" rights, as contemplated by § 1 of the 1871 Act, were the very rights which Congress took pains to specify in § 1 of the 1866 Act for the purpose of affording equality to the newly emancipated blacks. To the extent, however, that the 1871 Act is limited to enforcing rights violated "under color of State law," it is narrower than § 1 of the 1866 Act. But to the extent that it affords relief to all people, and not just former slaves, it is consistent with Congress' original understanding of the Thirteenth Amendment respecting equality which was subsequently made manifest in the Fourteenth Amendment. This theme was re-affirmed by Representative Arthur of Kentucky, an opponent of the 1866 and 1871 Acts, who described the reach of § 1 of the 1871 Act as "cumulative, as far as it goes, with certain provisions in the [1866] civil rights bill." Cong. Globe, 42d Cong., 1st Sess., 365 (1871).

Likewise, Senator Edmunds recognized the substantive interplay between the Fourteenth Amendment and the 1866 Act:

"The first section [of the 1871 Act] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and *it is merely carrying out the principles of the civil rights bill* [*of 1866*] *which have since become a part of the Constitution.*" Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (emphasis added).

Representative McHenry declared that § 1 of the 1871 Act "is intended as an amendment to the Civil Rights Act [of 1866]" which "gives a civil remedy for the deprivation of rights, privileges and immunities secured by the Constitution. . . ." Cong. Globe, 42d Cong., 1st Sess., 429 (1871).

The common thread running through this history is that Congress intended to secure to all citizens of the nation, black and white, the "full and equal benefit of all laws," at the same time subjecting everyone to equal "punishment, pain, and penalties, and to none other." 14 Stat. 27; 16 Stat. 140. Congress viewed "equality" as a substantive right, which included the equal right to contract, obtain access to the legal process, inherit, and own or lease real and personal property. *Id.* See Ten Broek at 234-237. Clearly, these were the rights that the 1871 Act was designed to enforce against abridgement under color of state law. Thus, when § 1 of the 1871 Act refers to rights "secured by the Constitution," it clearly applies to the rights set forth in the 1866 Act which were subsequently constitutionalized, at least against state deprivation, in the Fourteenth Amendment, and later restated in the 1870 Act in the form of implementing legislation. This is true regardless of whether the rights are characterized as "statutory" (based on the 1866 or 1870 Acts)

or "constitutional" (based on the Fourteenth Amendment) in nature, since these terms were used interchangeably. The point is that the 1871 Act was uniformly understood to provide a civil remedy to enforce the equal rights of national citizens as specified in the Fourteenth Amendment and its implementing legislation.

It is therefore not surprising that when in 1874 all federal statutes were revised and codified, language was added to the successors of § 1 of the 1871 Act to clarify this understanding. As the Court has noted, jurisdiction over § 1 claims was not independently defined in the 1871 Act, but "was given simply to enforce the substantive rights created by the statute. The two aspects, seemingly, were deemed to coincide." *Examining Board* v. *Flores de Otero, supra,* 426 U.S. at 582. As a result of the statutory revision* of 1874, however, § 1 was divided into cause of action and jurisdiction sections which are the direct predecessors of 42 USC § 1983 and 28 USC § 1343 (3) as we know them today. Rev. Stat. § 1979 afforded a cause of action whenever rights "secured by the *Constitution and laws*" had been violated, the words "and laws" having been added to § 1 of the 1871 Act. Jurisdiction of such actions in the circuit courts was provided by Rev. Stat. § 629(16), which referred to rights "secured

*See Revision of Statutes Act of 1866, c. 140, 14 Stat. 75 (1866); Revision of Statutes Act of 1874, c. 333, § 2, 18 Stat. 113 (1875). The purpose of the revision was to bring "together all statutes and parts of statutes which from similarity of subject ought to be brought together," in the process supplying omissions and altering the imperfections of the original text. *Id.* The revision was viewed as a codification of existing law, and not an expansion or contraction of substantive law. See 2 Cong. Rec. 825-828 (1874) (remarks of Rep. Lawrence); 2 Cong Rec. 646-650 (1874) (remarks of Rep. Poland); see generally Dwan & Feidler, *The Federal Statutes—Their History and Use,* 22 Minn. L. Rev. 1008, 1012-1014 (1938).

by the Constitution of the United States *or . . . by any laws providing for the equal rights of citizens . . . or* of all persons within the jurisdiction of the United States." District court jurisdiction was contained in Rev. Stat. § 563 (12), which pertained to rights "secured by the Constitution . . . *or of any rights secured by any law* of the United States." The latter section, however, was repealed in 1911 when Congress abolished the original jurisdiction of circuit courts and chose the language of Rev. Stat. § 629(16), which substantially survives as 28 USC § 1343 (3), to define the scope of district court jurisdiction. See Act of March 3, 1911, 36 Stat. 1087.

To be sure, the addition of "and laws" to Rev. Stat. § 1979 has been characterized by the Court in *dicta* as an enlargement of the coverage originally afforded by the 1871 Act. See, *e.g. Mitchum* v. *Foster,* 407 U.S. 225, 239 n.30 (1972); *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 543 n.7; *Hague* v. *C.I.O., supra,* 307 U.S. at 526. The Court made clear in *Hagans* v. *Lavine, supra,* 415 U.S. at 533 n.5, however, that it has yet to definitively construe the phrase. Respondent submits that, upon examination, it appears that neither Congress nor the revisers of the statutes ever intended to enlarge the original reach of § 1 of the 1871 Act by means of Rev. Stat. § 1979 or 42 USC § 1983. Indeed, § 1983 today still provides for redress, against state action, of constitutionally-based equal rights, as those rights have accumulated judicial meaning. The initial scope of § 1 of the 1871 Act has, in effect, been preserved. The 1874 revision was intended only to facilitate the integration of bits and pieces of comprehensive and cohesive legislation into a codified compendium.

For example, where § 1 of the 1871 Act referred *only* to "rights . . . secured by the Constitution," it was commonly understood that statutory rights secured by the

1866 and 1870 Acts were also included within this phrase. Thus, § 1979's reference to "Constitution *and laws*" means precisely what was intended in 1871: rights secured against state action by the Fourteenth Amendment, as implemented by the 1866 and 1870 Acts. It is significant that the term "*and* laws" was chosen by the revisers, since the "secured" rights which were the 1871 Act's object were generally viewed as having a basis in *both* the Constitution *and* the laws passed by Congress.

By contrast, had § 1979 been made applicable to rights secured by the "Constitution *or* laws," the argument that coverage was enlarged by revision would indeed have merit. This distinction, often not fully appreciated,* becomes particularly apparent when § 1979 is compared to the federal question jurisdiction statute, Act of March 3, 1875, § 1, 18 Stat. 470, now codified as 28 USC § 1331(a), which was passed almost contemporaneously. The latter, of course, provides for jurisdiction whenever an action "arises under the Constitution, laws, *or* treaties of the United States." A federal question is thus cognizable under § 1331(a) when it arises under either a statute, or a provision of the Constitution, while a § 1979 (i.e. § 1983) action must be based directly on the Fourteenth Amendment or on the Fourteenth Amendment in conjunction with an Act of Congress specifically implementing its guarantee of equality in the enjoyment of life, liberty or property. This thesis is adequately supported by the "equal rights" term of Rev. Stat. § 629(16), and the conscious choice of this language by Congress in 1911, albeit without explanation, as the sole provision for district court jurisdiction over civil rights actions. See Note, 52 Harv. L. Rev. 1136, 1138-1140 (1939); Note, 16 Geo. Wash. L. Rev. 260, 262 (1948).

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* See *Paul* v. *Davis*, 424 US 693, 696 n. 1 (1976).

Just prior to the adoption of the Revised Statutes by Congress, Representative Poland, the Chairman of the Committee on Revision, reported that great efforts had been made to avoid modification of existing law which would amount to "new legislation," since such action was beyond the scope of the act authorizing the revision. 2 Cong. Rec. 646-650 (1874) (remarks of Rep. Poland). Specifically addressing the compiler's re-structuring of the various civil rights acts, Rep. Lawrence stated that the revised sections "possibly may show verbal modifications bordering on legislation." 2 Cong. Rec. 827 (1874) (remarks of Rep. Lawrence). Clearly it was not the compiler's intent to effect substantive changes in Rev. Stat. § 1979, however, since that section was designed "to confer a right of civil action" for violations of the 1866 and 1870 Acts "so far as they relate to a declaration of *existing rights.*" *Id.* at 828. Moreover, such an intention would have violated the reviser's "relatively narrow mandate." *Georgia* v. *Rachel, supra,* 384 U.S. at 791.

The Court's decision in *Examining Board* v. *Flores de Otero,* 426 U.S. 572 (1976) provides guidance as to how Rev. Stat. § 1979, and thus the current § 1983, should be interpreted. The problem in *Flores* was that as a result of the statutory revision, § 1979 applied on its face to actions under color of law of any State "or Territory," whereas the jurisdictional provisions, including the present § 1343(3), lacked the "or Territory" phrase. The Court found that despite this discrepancy, no Congressional intention to restrict federal jurisdiction could be discerned. 426 U.S. at 583. The "common origin" of both § 1979 (i.e. § 1983) and § 1343(3) in § 1 of the 1871 Act "suggests that the two provisions were meant to be, and are, complementary." *Id.* It was therefore determined that jurisdiction over claims of the deprivation of rights under color of territorial law was proper, notwithstanding the

lack of an explicit grant, because otherwise a cause of action would have been created for which no jurisdiction had been provided. (Federal question jurisdiction was unavailable to redress such rights until 1875). *Id.* at 585. Moreover, the Court reasoned that had § 1 of the 1871 Act remained wholly intact, and the "or Territory" phrase thus added, jurisdiction would be undisputed. *Id.* n. 15.

In the instant case, however, the Social Security Act became law long after the enactment of federal question jurisdiction. But more importantly, if § 1983 and § 1343(3) are read as an "intact" statute as was their 1871 predecessor, it would be clear that the term "and laws" of § 1983 is the complementary equivalent of "law(s) providing for equal rights." As in *Flores,* when the statutes are harmonized, the more specific phrase should be construed to give meaning to the less specific. Moreover, petitioner's Social Security Act claim does not even state a cause of action pursuant to § 1983: no right "secured by the Constitution *and* laws" is presented in petitioner's complaint simply because the Social Security Act was not designed to implement the Fourteenth Amendment.* Petitioner's case thus does not raise the specter, presented in *Flores,* of a cause of action lacking complementary jurisdiction, since petitioner's claim fails under *both* § 1983 and § 1343(3).

Also instructive is *Georgia* v. *Rachel, supra,* a case in which the Court compared the pre-revision removal jurisdiction of § 3 of the 1866 Act to the post-revision statute currently codified as 28 USC § 1443(1). The latter permits a state court defendant to remove the action to federal court when the right he asserts is a "right under any law providing for equal civil rights." 384 U.S. at 788. This phrase first appeared in the Revised Statutes of 1874; formerly, § 3 of the 1866 Act provided for removal by persons asserting "the rights secured to them by the first section of this act [of 1866]." *Id.* at 788-789. The reason for the substituted language is rather obvious:

> "When the Revised Statutes were compiled, the substantive and removal provisions of the Civil Rights Act of 1866 were carried forward in separate sections. Hence, Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act—'rights secured to them by the first section of this act.'" *Id.* at 789.*

The Court had little difficulty deciding, however, that the altered language lacked any significance and was not intended to expand the scope of removal jurisdiction:

> "There is no substantial indication . . . that the general language of [42 USC § 1443(1) as revised] was intended to expand the kinds of 'law' to which the removal action referred. In spite of the phrase 'any law providing for . . . equal civil rights,' it seems clear that in enacting [§ 1443 (1)], Congress intended in that phrase only to include laws *comparable in nature* to the Civil Rights Act of 1866." *Id.* at 790 (emphasis added).

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* Indeed, the Court has consistently held that under the Fourteenth Amendment no right to public assistance exists nor is "wealth" per se a suspect classification. *Maher* v. *Roe,* 432 U.S. 464 (1977); *Lavine* v. *Milne,* 424 U.S. 577, 584 n.9 (1976); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

* As already demonstrated, when the cause of action and jurisdictional portions of § 1 of the 1871 Act were separated, a similar catch phrase, "any law providing for equal rights" was introduced for precisely the same purpose. Rev. Stat. § 629(16), now 28 USC § 1343 (3).

The Court recognized, in addition, that use of the phrase "any law providing for . . . equal civil rights" did not evince an intention to forever freeze the applicability of such removal jurisdiction to the exclusive terms of the 1866 Act. On the contrary, the Court noted that the phrase is "open-ended" and clearly envisioned "removal in cases involving 'a right under' both existing and future statutes that provided for equal civil rights." *Id.* at 789.

Respondent submits that the "equal rights" phraseology of § 1343(3) merits a similar construction. Thus, a § 1983 cause of action may be heard in federal court under § 1343(3) to provide redress whenever rights secured by the Fourteenth Amendment, the successor statutes of the 1866 Act, or legislation that has since been enacted to secure equal rights, are violated by state action. Additional support for this proposition is found in *Baines* v. *City of Danville,* 357 F. 2d 756, 763 (4th Cir.) aff'd 384 U.S. 890 (1966), in which the court of appeals analyzed the same removal statute considered in *Rachel* by comparing it to § 1983. The court found that the "and laws" phrase of the latter was used in the same sense as the term "laws" in the former, which is "consistent with the general congressional purpose in 1875 not to work substantive change." 357 F. 2d at 763. Extrapolating from the decision in *Baines,* one commentator has noted that:

> "[I]t is logical to assume from the language of section 1 of the Civil Rights Act of 1871, that the rights protected include those enumerated in the Acts of 1866 and 1870 and *any* other civil rights act as well as those 'secured' by the Constitution." Laufer, *Hague* v. *C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction——A Reappraisal,* 19 Buffalo L. Rev. 547, 560 (1970).

Since the Social Security Act does not fit into the category of laws to which § 1983 and § 1343(3) apply, petitioner's claims must necessarily fail. Indeed, petitioner concedes that there is "ample authority" for the proposition that the Social Security Act is not a law providing for equal rights. Brief for Petitioner at 18.

Over the years, the Court has construed the Fourteenth Amendment to secure against state action many of those fundamental rights guaranteed by the Bill of Rights against federal infringement. E.g. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) (freedom of speech and religion); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963) (freedom of assembly, freedom to petition for redress of grievances); *Mapp* v. *Ohio,* 367 U.S. 643 (1961) (freedom against unreasonable searches and seizures); *Gideon* v. *Wainwright,* 372 U.S. 335 (1960) (right to a fair trial). Since it is the *Fourteenth Amendment* which secures such rights against state infringement, § 1983 and § 1343(3) are of course available to enforce such rights. See *e.g. Douglas* v. *Jeanette,* 319 U.S. 157 (1943) (free speech and press); *Cruz* v. *Beto,* 405 U.S. 319 (1972) (free exercise of religion); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (right to petition legislature). This is true not because § 1983 and § 1343(3) have been expanded in scope, but because the scope of the Fourteenth Amendment has been broadened by judicial construction. The rights provided by the Social Security Act, however, are neither required by the Fourteenth Amendment nor designed to implement it.*

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* One further reason why petitioner's claims may not be asserted through § 1983 is alluded to in *District of Columbia* v. *Carter, supra.* In that case, the Court held that § 1983 was enacted for the limited

(Footnote continued on following page)

It has always been clear that § 1983 applies only to civil or equal rights, and not to all rights secured by general or common law. *Holt* v. *Indiana Manufacturing Co., supra; Bowman* v. *Chicago & N. R. Co.*, 115 U.S. 611 (1885). The primary deviation from this understanding is the decision in *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir.), *cert.* denied 332 U.S. 825 (1947). The plaintiff in that case was fired from her job because she had been absent while on federal jury duty. Seeking reinstatement and damages, she filed an action under § 1983. The court felt that whether a cognizable claim had been stated hinged upon whether the federal statute under which she served as a juror conferred upon her a "privilege" secured by the "Constitution and laws." The court found no deprivation of constitutional rights, but nonetheless declared that:

(Footnote continued from preceding page)

purpose of enforcing the Fourteenth Amendment, and since that amendment applies only to the States and not to the nation's capitol, a § 1983 cause of action does not lie to redress rights deprived under color of District of Columbia law. 409 U.S. at 423-425. Implicit in this decision is the fact that the reach of § 1983 is only as broad as the Fourteenth Amendment. The Social Security Act, however, covers a wider area since it applies to all States as well as the District of Columbia. 42 USC § 1302(a)(1). Therefore, if petitioner's construction of § 1983 were to prevail, an anomalous situation would be created in which residents of States could seek the redress of Social Security Act rights under § 1983 and § 1343(3), while District of Columbia residents asserting the same rights would be relegated to an action under 28 USC § 1331(a), including the amount in controversy prerequisite of $10,000. See 409 U.S. at 432, citing *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Surely there is no evidence that Congress intended to make public assistance available to all State and District of Columbia residents under the Social Security Act, but to provide unequal access to federal courts to enforce such rights depending upon the claimant's place of residence.

> "Although the books are full of cases under [§ 1983] concerning the deprivation of rights and privileges, secured by the Constitution, we have been unable to find any in which the right or privilege at stake was secured by a 'law' of the United States. Nevertheless the language is so plain that the only question is whether this particular 'law' secured to the plaintiff a 'privilege'." 162 F.2d at 139.

On the strength of this conclusionary analysis, the court found that an actionable claim had been stated. Most significant is the fact that the court treated § 1983 as both a cause of action *and* jurisdictional grant, and made no reference at all to § 1343(3) and its "equal rights" limitation. Accordingly, it is doubtful that this case adds anything to an analysis of the issues at bar. Perhaps for this reason, other lower courts have declined to follow the lead of *Bomar*. See, *e.g. Walker* v. *Bank of America*, 268 F.2d 16 (9th Cir.), *cert.* denied 361 U.S. 903 (1950); *Insular Police Commission* v. *Lopez*, 160 F.2d 673 (1st Cir.), *cert.* denied 331 U.S. 855 (1947); *Schatte* v. *Int. Alliance of Theatrical Stage Employees*, 182 F. 2d 158 (9th Cir. 1950); *McGuire* v. *Amrein*, 101 F. Supp. 414 (D. Md. 1951).

Purely apart from the light shed by the legislative history, it is clear from the face of § 1343(3) that the result urged by respondent is required. The statute applies only to statutory rights secured by Acts "providing for equal rights." This language is plain and speaks for itself. Petitioner has offered no justification for reading this phrase contrary to its clear meaning, and therefore it should be given full effect.

Whether § 1983 and § 1343(3) are thus read literally or in the context of the events which nurtured their de-

velopment, it is reasonable to view these statutes as complementing one another. Section 1983 provides a framework within which rights deprived by state action may be redressed. Section 1343(3) provides a federal forum for such claims. There is no indication that Congress has ever deviated from its original purpose in enacting these statutes: to enforce the provisions of the Fourteenth Amendment and subsequent legislation which implements that amendment. Since the Social Security Act neither implements the amendment, nor is a necessary adjunct to the enforcement of Fourteenth Amendment guarantees, the Third Circuit properly concluded that petitioner's claim under that Act was not cognizable in the federal courts pursuant to § 1983 and § 1343(3).*

Finally, it is important to note that the conclusion that § 1983 and § 1343(3) are not applicable does not leave petitioner without any remedy. Where rights other than civil rights are conferred by federal statute, the act itself invariably contains unique procedures whereby a party who claims that he has been denied his due under the law may challenge that denial. This is especially true in the Aid to Families with Dependent Children (AFDC) portion of the Social Security Act, which expressly mandates that a "fair hearing" be provided to any individual whose claim is denied or not acted upon with reasonable

* It should be noted that, perhaps in recognition of the existing state of the law, H.R. 9622, 95th Cong., 2d Sess. (1977) was introduced to abolish the $10,000 threshold for federal question jurisdiction. One of the primary purposes of this proposed amendment is to permit welfare claims such as those presented by petitioner to be heard in the district courts. See H.R. Rep. No. 95-893, 95th Cong., 2d Sess. 8, 19 (1978). The House of Representatives approved the bill on February 28, 1978. 124 Cong. Rec. H 1553-H 1570 (daily ed. February 28, 1978).

promptness. 42 USC § 602 (a) (4); see N.J.S.A. 44:10-2, 44:7-18. This is the remedial proceeding provided by Congress. In New Jersey, as in most states, AFDC applicants have an additional measure of protection: the right to judicial review of adverse "fair hearing" determinations. N.J. Ct. R. 2:2-3(a)(2); *Essex County Welfare Board* v. *Department of Institutions and Agencies,* 75 N.J. 232, 237 (1978). In addition, the U.S. Department of Health, Education and Welfare ensures that State AFDC plans conform to federal law by wielding powerful fiscal authority over participating states. 42 USC § 604. This then, is the scheme Congress structured to distribute public assistance funds to the eligible needy. An overly expansive interpretation of § 1983 and § 1343 (3) beyond what Congress intended should not be permitted to circumvent the review procedures specifically provided in the Social Security Act which, after all, is the legislation upon which petitioner relies.

POINT III

Since the public assistance benefits sought by petitioner are not secured by any "act of Congress providing for the protection of civil rights," the district court lacked jurisdiction to consider petitioner's claim.

Notwithstanding any other contentions, petitioner asserts that 28 USC § 1343(4) provides an independent, alternate jurisdictional basis for her claim of denial of emergency public assistance benefits. Section § 1343(4), enacted by Congress to assure jurisdiction over actions arising out of the Civil Rights Act of 1957, grants original jurisdiction to the district courts provided that two prerequisites are satisfied: (1) plaintiff's cause of action

must be "authorized by law," and (2) the relief sought must be grounded in "any Act of Congress providing for the protection of civil rights, including the right to vote." Petitioner's failure to meet either, let alone both, of these requirements provided ample justification for the Third Circuit's conclusion that the complaint should be dismissed.

The legislative history of the 1871 Act plainly demonstrates that § 1983 is the "law" which "authorized" the cause of action to enforce rights within the contemplation of § 1343's "authorized by law" clause. See Comment, *The Civil Rights Act and Mr. Monroe,* 49 Calif. L. Rev. 145, 148 (1961). The precursor of § 1983 was universally viewed not as a source of substantive rights, but as creating a federal remedy to enforce the rights earlier secured by the Fourteenth Amendment and § 1 of the 1866 Act. *Mitchum* v. *Foster, supra,* 407 U.S. at 239 ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."); *Monroe* v. *Pape, supra,* 365 U.S. at 173-174; Cong. Globe, 42d Cong., 1st Sess., app. 50, 68, 216 (1871). As succinctly put by the court below:

> "[S]ection 1983 does not in and of itself create or secure any substantive rights; it merely authorizes a cause of action when rights secured by *another* source have been infringed." 560 F.2d at 168.

Thus, § 1983 is *not* an act "providing for the protection of civil rights" within the meaning of the second criterion specified above because it secures no substantive rights. More importantly, it is by its very terms incapable of satisfying both prerequisites at the same time. For

were § 1983 alone able to satisfy both prerequisites, no substantive civil right would be implicated.

The actual source of petitioner's purported right is § 406(e) of the Social Security Act. Petitioner has pointed to no provision in that Act which "authorizes" a civil action to be brought in compliance with the first prerequisite of § 1343(4). Moreover, petitioner concedes in the face of formidable circuit court authority that the Social Security Act neither provides for equal rights nor protects civil rights. Brief for Petitioner at 18.* As such, petitioner has failed either to state a § 1983 claim or to satisfy the jurisdictional requirements of § 1343(4) respecting her asserted Social Security Act right. Petitioner's argument, appropriately characterized by the Third Circuit as a "chicken-and-egg" approach, should be rejected for this reason.

Proper resort to § 1343(4) is demonstrated by *Allen* v. *Bd. of Elections,* 393 U.S. 544 (1969), a case clearly involving "the right to vote" brought pursuant to the Voting Rights Act of 1965. The Court construed § 5 of the 1965 Act as both authorizing the appellants to file an action for declaratory relief, and securing to them the substantive right to vote notwithstanding certain state enactments which had not been approved by the courts under the terms of the Voting Rights Act. *Id.* at 554-557.

On the other hand, in *Jones* v. *Alfred H. Mayer Co., supra,* plaintiffs sued to enforce their right to purchase property, pursuant to 42 USC § 1982, and invoked juris-

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* Indeed, even if that Act were construed to protect civil rights, it would certainly not "plug directly into 1343(3) and (4)" as asserted by petitioner (Brief for Petitioner at 18 n.5) since the Social Security Act, as already noted, does not satisfy the "authorized by law" clause of its own accord. Section 1983, though, would suffice.

diction pursuant to § 1343(4). 392 U.S. at 412 n.1. It is first of all clear that the question of jurisdiction was not contested and that therefore no part of the holding of that case concerned the propriety of jurisdiction under § 1343(4). It is firmly established that:

> "when questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine, supra,* 415 U.S. at 532 n.5.

Apart from this principle, however, it is evident that § 1982, which secures the substantive rights first enumerated in the Civil Rights Act of 1866, is "an Act of Congress providing for the protection of civil rights." Since *Jones* was an action to redress private discrimination, and not the deprivation of rights under color of State law, § 1343(4) was the only appropriate source of jurisdiction. Compare § 1343(3), which only applies to deprivations resulting from State action. *Jones* therefore offers no support to petitioner, whose claim is that she has been denied benefits by the State. Accordingly, her claim must stand or fall under § 1983 which, as already demonstrated, does not enforce Social Security Act rights.

Accordingly, the Third Circuit correctly concluded that the Social Security Act does not protect civil rights, and that § 1983 is merely a remedial statute providing a cause of action when such rights, secured elsewhere, are violated. Petitioner's complaint was thus properly dismissed for lack of jurisdiction under § 1343(4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Respondent G. Thomas Riti, Director, New Jersey Division of Public Welfare.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

RICHARD M. HLUCHAN,
Deputy Attorney General,
On the Brief.